FILED

05-801 DEC 23 2005

No. OFFICE OF THE CLERK

In the Supreme Court of the United States

KEVIN MARK SABO,

Petitioner

v.

THE HONORABLE BETH ARTHUR, SHERIFF, COUNTY OF ARLINGTON, COMMONWEALTH OF VIRGINIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Kevin Sabo was convicted of Attempted Malicious Wounding based in large part on statements recorded by a private citizen acting on the request of the police. These questions are asked. (1) Can a government agency relationship be terminated after the assigned task has been performed but before incriminating evidence is found? (2) How should a court trace the steps of coercive threats to determine whether they resulted in incriminating statements? (3) Are a defendant's due process rights violated when the Commonwealth of Virginia argued one set of facts to a criminal jury and an opposite set of facts to an appellate court, and (4) does a defendant forfeit his right to offer expert testimony to challenge the reliability of a confession when he chooses to testify.

Petitioner challenges his conviction based on the Fifth and Fourteenth Amendments to the Constitution of the United States.

TABLE OF CONTENTS

Questions Presented i

Table of Contents ii

Table of Authorities iii

Statement of the Case 1

Summary of Argument 2

Argument 5

Conclusion 25

TABLE OF AUTHORITIES

Arizona v. Fulminante,
499 U.S. 279 (1991).....12

Banks v. Dretke,
540 U.S. 668, 696 (2004).....22

Colorado v. Connelly,
479 U.S. 157 (1986).....9

Coolidge v. New Hampshire,
403 U.S. 443, 487 (1971).....5, 8, 10

Crane v. Kentucky,
476 U.S. 683 (1986).....24

Garrity v. New Jersey,
385 U.S. 493 (1967).....14

Giglio v. United States,
405 U.S. 150, 153 (1972).....22

Lisenba v. California,
314 U.S. 219, 241.(1941).....12, 16

Lynumn v. Illinois,
372 U.S. 528, 534 (1963).....14

Mooney v. Holohan,
294 U.S. 103, 112 (1935).....22

Morgan v. Juvenile,
491 F.2d 456 (1974).....22

Pritchett v. Commonwealth,
263 Va. 182, 557 S.E.2d 205 (2002)...24

Sabo v. Commonwealth,
38 Va.App. 63 (2002).....2, 5, 9

Schneckloth v. Bustamonte,
412 U.S. 218, 226 (1973).....11

Skinner v. Railway Executives Ass'n.,
489 U.S. 602 (1989).....5, 6, 8, 25

Stone v. Wingo,
416 F2d 857, 860 (6th Cir. 1969).....6, 9

Strickler v. Greene,
527 U.S., 263 (2001).....22

United States v. Feffer,
831 F2d 734, 739 (7th Cir. 1987).....6, 9

United States v. Smith,
27 F.Supp.2d 1111 (C.D. Ill.1998).....6, 9

United States v. Garlock,
19 F3d 441, 443 (8th Cir. 1994).....6

United States v. Jarrett,
338 F3d 339 (4th Cir. 2003).....6, 8, 19

STATEMENT OF THE CASE

Kevin Mark Sabo, Petitioner Pro Se, seeks review of the Order of the U.S. District Court for the Eastern District of Virginia to dismiss his application for a Writ of Habeas Corpus. The District Court also denied Petitioner's Certificate of Appealability. Appendix, at A5.

Petitioner Sabo sought a Certificate of Appealability from the U.S. Court of Appeals for the Fourth Circuit. That request was denied on August 25, 2005. Appendix, at A2. Sabo then filed a Petition for Rehearing and Rehearing En Banc. This petition was denied on September 27, 2005. Appendix, at A1. Petitioner Sabo prays for consideration of this matter by the Supreme Court of the United States.

This issue stems from Sabo's January 28, 2000, conviction in the Circuit Court of Arlington County, Virginia, of Attempted Malicious Wounding in violation of Virginia Code §§ 18.2-26 and 18.2-51. In the course of a jury trial, the Commonwealth of Virginia demonstrated over Sabo's plea of innocence that he tampered with a vehicle owned by complainant Heather Nicole Lawrence and thereby caused it to collide with a fence. There were no injuries. He was sentenced to pay a fine of $1,668.00 and serve eighteen months in prison. Sabo paid his fine and duly reported to the Arlington County Detention Facility to serve his sentence.

The Commonwealth carried Sabo's conviction largely on incriminating statements made by him during tape-recorded telephone conversations with Lawrence. In a November 3, 1999 preliminary hearing on a motion to suppress the statements, Sabo argued that Lawrence was acting as an agent of the police when she made her threats, and that his ensuing statements were coerced. The Circuit Court of Arlington County, Virginia disagreed, concluding the extent of the government's involvement was minimal, if

any other than providing recording equipment, and that Sabo's statements were not coerced because he had other options to making the statements, such as calling his lawyer.

Sabo's conviction was upheld by the Virginia Court of Appeals in a published ruling. Appendix, at A22.

Before his release from the Arlington County Detention Facility, Sabo filed a *pro se* Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254. A similar petition was filed with the Virginia courts which fell moot when Sabo was released from custody. In addition to the claims filed on direct appeal, Sabo's petition also argued the Commonwealth deprived his due process rights by introducing statements of fact on appeal it had previously conceded to be false.

Petitioner seeks relief under the Fifth and Fourteenth Amendments of the Constitution of the United States.

SUMMARY OF ARGUMENT

Kevin Sabo, Petitioner pro se, most respectfully argues that the dissenting view of Virginia Court of Appeals Judge Benton in *Sabo v. Commonwealth of Virginia* (R. No. 0538-00-4, slip. op., Appendix, at A38-47), is the correct application of the facts in this matter to existing Supreme Court precedent. That dissenting view is incorporated herein. Sabo respectively encourages this Honorable Court to review this opinion and recognize that the Commonwealth of Virginia encouraged, endorsed, and participated in the activities of a private citizen to collect evidence. In doing so, this private citizen acted in a manner that would have been unconstitutional if the police had collected it themselves.

Just how much police involvement is needed to transform a private citizen into an agent of the government? At trial, the government's own witnesses supported the claim that a private citizen was acting on behalf of the police when she used government-issued equipment to seek evidence for the express purpose of having Sabo prosecuted. Not only did the police provide, install, and test recording equipment, they instructed her in its use and specifically told her to contact and record Sabo's remarks.

State and lower Federal courts relied on two facts in determining that no agency relationship existed. First, the police later suggested that this individual no longer contact Sabo. Because she did so anyway, this view contends, the police did not "direct or influence" her actions. Such after-the-fact instructions, however, do nothing to put the toothpaste back into the tube. The correct legal question is whether Lawrence was acting on behalf of the police, and under their encouragement, endorsement, or participation at the time she issued threats against Sabo. Her agency status during later conversations is immaterial.

Because we know from the government's witness that threats were issued during the police-instructed conversation, the sole question remaining therefore is whether these threats shaped Sabo's eventual statements.

The second fact relied upon was that no incriminating statements were made during the initial conversation instructed by the police. Under this theory, only an immediate response by Sabo would have been coerced. Sabo's statements, however, were made several days after the initial conversation and after the threats were repeated. Again, however, these courts ask the wrong question. The threats broadcast by their agent during the initial conversation did not become inoperative simply because she hung up the telephone. The correct legal analysis would

follow the footsteps of these initial threats to determine whether Sabo relied upon them when uttering the incriminating statements.

Here again, both participants to these conversations attest that the incriminating statements were made out of a panicked fear that the threats were being carried out. The incriminating statements were made several days later, but no evidence was presented suggesting that anything other than time could have lessened their impact on Sabo.

Prior rulings by the Supreme Court have granted considerable discretion to local courts to determine the threshold to government agency. Likewise, the determination of when an individual's will has been "overborne" requires an analysis of the totality of the circumstances. The Court has not, however, permitted those thresholds to be so high as to make them irrelevant. Indeed, the intervention of this Court is absolutely necessary when a State believes that it can equip a private citizen to collect evidence, instruct them to collect that evidence, and then deny responsibility for the actions taken by that individual.

What makes these issues of particular import is the apparent willingness of the Commonwealth of Virginia to argue one fact before a criminal jury, and then refute that same fact before an appellate court. Regardless of whether the local prosecutor or Virginia's Attorney General were correct in their version of the truth, Sabo's due process rights were violated. It appears that once again it is time for this Court to remind local law enforcement officials of their responsibility to the truth.

Finally, the Petitioner respectfully argues that the District Court erred in denying that Mr. Sabo had a constitutional right to present expert testimony on the reliability of his incriminating statements. The District Court

agreed with Virginia's appellate court that Sabo's testimony itself was the only defense he was permitted in a challenge to the reliability of those statements. Again, the dissenting view in *Sabo v. Commonwealth*, *Id.*, speaks eloquently on this matter.

ARGUMENT

A. This Court's Decisions Dictate the Factual Inquiry Undertaken by the Court Below Into Whether Actions by a Private Citizen Are Deemed the Responsibility of Local Police.

The Federal District Court properly identified *Skinner v. Railway Labor Executives Ass'n.*, 489 U.S. 602 (1989) as controlling authority on the question of government agency. There, this Court stated, "[t]he fact that the government has not compelled a private party to perform [the questioned act] does not, by itself, establish that the [act] is a private one." The question turns on "the degree of the government's participation in the private party's activities." Id., at 614-15. The *Skinner* Court held in the context of employer testing of railway industry workers that an agency relationship is created by the active *encouragement, endorsement, and participation* in the testing by the government through complex laws and regulations. *Id.*, 613-618. (Emphasis added.)

In practice, moreover, the high Court has looked to such issues as whether the suspect agent acted "wholly on [their] own initiative." *Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971). In *Coolidge*, the defendant claimed that his wife was acting as an agent of the police when she searched their home and provided police with evidence needed to justify an arrest warrant. The Court held that the police did not coerce or dominate her, and they were not obligated to refuse her unilateral offer for them to take the

evidence. In the Court's words, she was acting wholly on her own initiative.

Lower courts have asked whether the alleged agent would have taken the action without the government's involvement. *United States v. Feffer*, 831 F2d 734, 739 (7th Cir. 1987). Or, whether the private party acted at the request of the government? *United States v. Smith*, 27 F.Supp.2d 1111, 1115 (C.D. Ill. 1998). A defendant must show "the government exercised such coercive power or such significant encouragement that it is responsible" for the individual's conduct. *United States v. Garlock*, 19 F3d 441, 443 (8th Cir. 1994). Finally, the actions of private parties are attributed to the state where "private parties act . . . in pursuance of some design or in accordance with some scheme." *Stone v. Wingo*, 416 F2d 857, 860 (6th Cir. 1969). A private individual will be deemed an agent of the government if there is, "evidence of Government participation in or affirmative encouragement of the private search . . . the government must also affirmatively encourage, initiate or instigate the private action." *United States v. Jarrett*, 338 F3d 339 (4th Cir. 2003). Other than *Skinner*, these cases were neither cited nor applied in this instance.

In summary, though different adjectives are used by different courts, most have recognized an agency relationship when the police have actively encouraged, endorsed, and participated in a private individual's behavior. Virginia, on the other hand, seeks a higher standard; one of absolute control, or "direction."

Here, it is uncontested that the Arlington police encouraged, endorsed, and participated in Lawrence's effort to place and record conversations seeking evidence to be used against Sabo. The prosecution's own witnesses attest to the following:

1. As part of its official investigation, the police asked Lawrence to move back into her apartment so that a recording device could be installed on her telephone. Appendix, at A48.

2. The police supplied Lawrence with a government tape recorder, installed it in her apartment, tested it through the police switchboard, and instructed her in its use. Appendix, at A49.

3. The police "instructed" Lawrence to contact Sabo. Appendix, at A50.

4. Lawrence placed numerous telephone calls to Sabo as instructed by the police, and recorded their conversations. Appendix, at A51.

5. Lawrence had no contact with Sabo until instructed to do so by the police. Appendix, at A52.

6. During the course of her first telephone conversation, Lawrence made a number of threats, demands for a cash payment, and promises not to pursue civil or criminal remedies. Id. These are discussed further infra.

7. Lawrence's goal for obeying the police instructions was, inter alia, to support the "case" against Sabo and seek "justice." Appendix, at A53.

8. Lawrence immediately took the tapes, as prearranged, to Arlington Detective John Coale. Appendix, at A54.

9. Following their review of the initial conversations, Coale suggested Lawrence "leave it alone and see how the case develops," and he then said that she